Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT GRANT SUTHERLIN, STEPHEN L. KELLER,
and STERLING KEITH DRACH,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, to obtain a conviction under the federal mail and wire fraud statutes, the government must prove that the fraudulent representations would deceive persons of ordinary prudence?

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PETITION FOR A WRIT OF CERTIORARI

Robert Grant Sutherlin, Stephen L. Keller, and Sterling Keith Drach petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-5) is unreported.[1] The court's denial of rehearing and rehearing en banc on the question presented here (App. 20-22) is unreported. The opinion of the district court (App. 6-19) is unreported.

JURISDICTION

The court of appeals entered judgment on December 21, 2004. App. 1. The court denied a timely petition for rehearing and for rehearing en banc with respect to the question presented here on May 31, 2005. App. 20.[2] The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

18 U.S.C. § 1341 provides in relevant part:

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[1] Citations to "App." are to the Appendix to this Petition. Citations to "JA" are to the Joint Appendix filed in the court of appeals.

[2] On petition for rehearing and rehearing en banc, the panel vacated petitioners' sentences in light of *United States v. Booker*, 125 S. Ct. 738 (2005), but denied the petition in all other respects, including on the question presented here.

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier . . . shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1343 provides in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

STATEMENT OF THE CASE

A grand jury in the Eastern District of Kentucky indicted petitioners on July 11, 2002. The indictment charged petitioners with mail and wire fraud and conspiracy to commit those offenses. The indictment also charged

petitioners with money laundering and conspiracy to commit money laundering. The alleged mail and wire fraud formed the specified unlawful activity for the money laundering counts.

The indictment alleged that petitioners committed fraud through the purchase and sale of life insurance policies held by terminally ill persons. According to the indictment, "terminally ill persons would fraudulently obtain life insurance policies [from insurance companies] through the use of false statements or other deceptions," generally concerning their health and medical condition. The company for which petitioners worked (Kelco) would buy those policies from the insureds. JA 76.

At trial, petitioners contended in part that the insureds' false statements were not reasonably calculated to deceive the insurance companies, because insurers of ordinary prudence would have readily determined from medical records and other sources that the statements at issue were untrue. The evidence established that the insurance companies issued the policies in question with little underwriting other than the application form itself. An insurance company representative testified, for example, that on a $75,000 policy the company spent forty minutes asking the applicant questions and a dollar for a database search before issuing the policy. JA 1018-19. On policies with a face value below $100,000, the insurance companies typically did not require a blood test, contact physicians, or request medical records.

In keeping with this defense theory, petitioners submitted a proposed instruction defining the "ordinary prudence" element of mail fraud and wire fraud, based on the Sixth Circuit's decision in *Blount Financial Services v. Walter E. Heller and Co.*, 819 F.2d 151 (6th Cir. 1987).

Petitioners' proposed instruction provided (1) that the prosecution would not meet its burden of proof on the "scheme or artifice to defraud" element of the mail and wire fraud offenses if the jury concluded that an ordinary and prudent insurance company would not have accepted the insureds' representations, but would have verified them independently, and (2) that, if the jury concluded that the insurance companies were in as good a position as the defendants to determine the truth or falsity of the representations in the insurance applications, then the jury must find that the government had failed to prove the "scheme or artifice to defraud" element. JA 188, 1637-40, 1654.

Although the district court recognized that the insurance companies' prudence "may be a or perhaps the key issue here at trial," JA 1571, it rejected petitioners' proposed "ordinary prudence" instruction, App. 14-16, 24-26. The court gave a different instruction, to which petitioners objected. The district court's instruction correctly informed the jury that the prosecution had the burden of proving "that the fraudulent pretenses, representations, and promises were reasonably calculated to deceive persons of average prudence." App. 28. But the instruction explained this element incorrectly. It stated that "defendants have argued that an ordinary and prudent victim should not have merely accepted the potential insured's representations concerning his health and medical history but would have verified those matters independently." The instruction then told the jury that if it "f[ou]nd this argument persuasive in light of the evidence in this case, it may be considered to determine whether the defendants had the intent to deceive required for this crime as previously explained to you in these instructions." App. 28-29.

Petitioners contended in the courts below that the district court's instruction misstated the law in two respects. First, instead of declaring unequivocally that the prosecution must prove the "ordinary prudence" element to obtain a mail or wire fraud conviction, the instruction relegated that element to a mere "argument" by the defendants that the jury could consider if it found the argument "persuasive." Second, the instruction permitted the jury to consider the "ordinary prudence" issue solely as it related to the defendants' "intent to deceive," rather than as a necessary component of the alleged scheme or artifice to defraud.

The jury convicted Sutherlin and Keller on all counts, and it convicted Drach on the two conspiracy counts. On August 12, 2003, the district court, applying the United States Sentencing Guidelines, sentenced Keller to 168 months, Sutherlin to 151 months, and Drach to 78 months. On May 31, 2005, the Sixth Circuit vacated the sentences in light of *Booker*. Petitioners will be resentenced on September 16, 2005.

Petitioners challenged the district court's "ordinary prudence" instruction on appeal. Citing *Neder v. United States*, 527 U.S. 1 (1999), petitioners argued that common law fraud included the "ordinary prudence" element when Congress enacted the mail and wire fraud statutes, and nothing in the text or structure of those statutes suggested an intent to exclude that element.

On December 21, 2004, the Sixth Circuit panel affirmed the convictions. On the "ordinary prudence" issue, the panel concluded that "[t]he defendants' proposed instruction would have impermissibly shifted the jury's focus away from the defendants' intent toward the victims' reaction to the fraud." App. 2-3. The panel did not cite *Neder* or mention petitioners' common law analysis. The court of

appeals denied the petition for panel rehearing and for rehearing en banc on the "ordinary prudence" issue. App. 20.

REASONS FOR GRANTING THE WRIT

In recent years, this Court has repeatedly granted certiorari to determine the scope of the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343. *See, e.g., Pasquantino v. United States*, 125 S. Ct. 1766 (2005) (wire fraud statute includes scheme to defraud foreign government of tax revenue); *Cleveland v. United States*, 531 U.S. 12 (2000) (state license does not constitute property for purposes of the mail fraud statute); *Neder v. United States*, 527 U.S. 1 (1999) (materiality is an element of the mail and wire fraud statutes); *Carpenter v. United States*, 484 U.S. 19 (1987) (confidential business information constitutes "property" under the mail and wire fraud statutes); *McNally v. United States*, 483 U.S. 350 (1987) (mail fraud statute does not include scheme to deprive another of honest services). The Court's focus on these statutes is understandable; they are among the most commonly used weapons in a federal prosecutor's arsenal. In 2003 alone, according to the Federal Justice Statistics Resource Center, 1160 defendants were charged under §§ 1341 and 1343. *See* http://fjsrc.urban.org.

This case invites the Court again to clarify the scope of the mail and wire fraud statutes. As set forth in Part I below, the courts of appeals have taken three incompatible approaches to the "ordinary prudence" element of these offenses. One approach rejects that element entirely. A second approach, adopted by the lower courts in this case, treats the ability of the false representations to deceive persons of ordinary prudence as a matter for the jury to consider in determining whether the defendant acted with